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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 1095 142

LELAND H. CAMERON,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, Leland H. Cameron, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Statement of the Matter Involved.

Two issues are presented to this Court:

(1) Has the Civil Aeronautics Board power to suspend an airline transport pilot certificate for alleged violation of Civil Air Regulations by a pilot flying for the army and in compliance with army instructions?

(2) If the Civil Aeronautics Board has such power, is its finding supported by substantial evidence?

Upon charges presented by the Administrator of Civil Aeronautics, the Civil Aeronautics Board, upon the record which is filed in this Court, found that the petitioner, who at the time was flying an army plane for the army, violated civil air regulations in a landing at Indianapolis, and ordered his certificate "restricted for an aggregate period of thirty days," with a provision that: "During such time Respondent [petitioner here] shall be permitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department" (R. 3).

On review under Title 49, section 646, of the United States Code, the United States Circuit Court of Appeals, by judgment entered Feb. 4, 1944 (R. 40), affirmed the order of the Civil Aeronautics Board. A petition for rehearing was denied March 14, 1944 (R. 40).

This Court has Jurisdiction.

The judgment and decree of the Circuit Court of Appeals affirming the order of the Civil Aeronautics Board is expressly made subject to review by this Court upon certiorari (U. S. Code, Title 49, section 646, paragraph (f)).

The Questions Presented.

The questions presented to this Court are:

(1) Is petitioner subject to discipline by the Civil Aeronautics Board if flying for the army and in compliance with army instructions?

(2) Is there substantial evidence supporting the finding of the Civil Aeronautics Board, if that Board has authority?

Reasons relied upon for Allowance of Writ.

Petitioner contends that:

(1) The only evidence in the record upon the issue shows that he was flying for the army and in compliance with army instructions;

(2) The finding of the Civil Aeronautics Board is not supported by substantial evidence; and where, as here, the finding is based on written evidence, both the Circuit Court of Appeals and this Court may determine whether such evidence has "rational probative force." The question also presents itself as to evidence necessary to penalize a person for what counsel below alleged to be "almost criminal" conduct.

Respectfully submitted,

DANIEL D. CARMELL,
WALTER F. DODD,
Attorneys for Petitioner.

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OCTOBER TERM, A. D. 1943

No. .....

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 140 Federal Reporter, 2d 482. The opinion is also printed in full in the record (R. 34-39).

Jurisdiction.

The jurisdiction of this Court is invoked under Title 49, section 646, of the U. S. Code, paragraph (f) of which

applies to this case the provisions of Title 28, section 347.

Judgment was entered in this case by the United States Circuit Court of Appeals on February 4, 1944, and petition for rehearing was denied on March 14, 1944 (R. 40).

Statement of the Case.

This case involves an order of the Civil Aeronautics Board restricting petitioner's airline transport pilot certificate for a period of thirty days, during which he is "permitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department."

The charges before, and the findings of, the Civil Aeronautics Board can best be shown by the terms of the order limiting the pilot certificate. The order (which was later amended with respect to the time when the restriction begins to run), sets forth the complaint in full and reads as follows:

> *Order Limiting Airman Certificate—October 29, 1943.*
>
> A complaint having been filed by the Administrator of Civil Aeronautics alleging that Leland H. Cameron (hereinafter referred to as "Respondent"), the holder of airline transport pilot certificate No. 16198, is not qualified to hold said certificate in that:
>
> "1. Respondent, on or about January 13, 1943, while holder of the aforementioned certificate, piloting an aircraft identified as NX 13365, made a downwind landing approach at the Indianapolis, Indiana Municipal Airport, directly in the path of an Eastern Air Lines aircraft which had commenced its take-off run after being cleared to do so by the control tower, and that he thereby needlessly and recklessly created a risk to life and property.
>
> 2. Respondent, on or about January 20, 1943, while holder of the aforementioned certificate, piloted an Army B-25 aircraft, 113150, acrobatically over and/or within 1,000 feet horizontally of the

Indianapolis, Indiana Municipal Airport, in that he performed a dive followed by a steep climbing turn over buildings located on said airport, contrary to the provisions of section 60.700 of the Civil Air Regulations.

3. Respondent, in executing the above mentioned maneuvers, descended to an altitude of lower than 500 feet above the ground, contrary to the provisions of section 60.3503 of the Civil Air Regulations.

4. Respondent, on said flight, subsequently executed a landing at said airport at right angles to traffic, thereby indicating a reckless disregard for life and property."

The Respondent having waived in writing the statutory right to notice and hearing, and evidence having been received:

Now, therefore, upon due consideration of all the evidence of record in the above-entitled proceeding:

THE BOARD FINDS:

1. The charges contained in the first paragraph of the complaint have been withdrawn;

2. Respondent committed the acts charged in the second and third paragraphs of the complaint;

3. The evidence does not establish the charges alleged in the fourth paragraph of the complaint; and

4. The public interest requires that Respondent's airline transport pilot certificate be restricted for a period of 30 days to permit Respondent to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department.

IT IS ORDERED, That Respondent's airline transport pilot certificate No. 16198 be and it is hereby restricted for a period of 30 days. Said period of restriction shall commence to run ten days from the date of this order and shall continue until such certificate has been restricted for an aggregate period of 30 days. During such time, Respondent shall be per-

mitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department (R. 2-3).

Section 60.700 of the Civil Air Regulations provides that "no person shall acrobatically fly an aircraft * * * at any height whatsoever over a congested area of any city, town or settlement, or over any open-air assembly of persons, or over any airport or landing area or within 1000 feet horizontally thereof, or within the limits of a civil airway except within that portion lying adjacent to, but outside of a range approach channel." This section must be read with Sections 60.702 and 98.104 of the Civil Air Regulations which provide that: "Aerobatics are unnecessary flight evolutions voluntarily performed with an aircraft requiring or resulting in an abrupt change in its attitude, an abnormal attitude, or operations in excess of the aircraft's design level flight speed (placard value). A normal bank not in excess of 70 degrees will not be considered as an abrupt change in the aircraft's attitude or as an abnormal attitude." Section 60.3503 of the Civil Air Regulations provides that "Exclusive of taking off from or landing upon an airport or other landing area aircraft shall not be flown below the following minimum safe altitudes of flight: * * * 500 feet above the ground or water * * *."

Attention should be called to the fact that the charges in paragraph 1 of the complaint were withdrawn, and that the evidence was found insufficient to support the charges alleged in the fourth paragraph of the complaint. The order was therefore based solely on the charges alleged in paragraphs 2 and 3 of the complaint.

To establish the charges in paragraph 2 of the complaint requires proof of a dive followed by a steep climbing turn over buildings located on the Indiana Municipal Airport, through "unnecessary flight evolutions voluntarily

performed with an aircraft requiring or resulting in an abrupt change in its attitude," and with a bank in excess of 70 degrees.

To establish the charge in paragraph 3 of the complaint requires proof of all charges in paragraph 2 of the complaint, and, in addition, proof of a descent to an altitude lower than 500 feet from the ground in maneuvers charged in paragraph 2, and with such lower flight exclusive of "landing upon an airport."

In its opinion the Circuit Court of Appeals found that:

> "Petitioner has been a licensed airplane pilot for thirteen years and his flying career has been divided into three parts: Army, testing and airline flying. He has accumulated 1300 hours of Army flying time, 300 hours of testing, and 3700 hours of airline flying time, making a total of 5,300 hours in the air. During all of this time his flying has never been questioned by pilots, control tower operators, or by the Civil Aeronautics Authority. For a period of over nine months prior to the date of the charge here involved, he had been engaged in flights of an experimental nature vital to the war effort and necessitating deviation from standard procedure" (R. 36).

This statement is fully supported by the record (R. 12, 21). The Circuit Court of Appeals does not specifically state that the flight to which this charge relates was one of those necessitating deviation from the standard procedure, but this is specifically stated in the record by petitioner's superior army officer (R. 21).

The Circuit Court of Appeals has held that Petitioner's action in the flight involved in this case is subject to the disciplinary power of the Civil Aeronautics Board, and that there is substantial evidence to support the Board's findings. Petitioner contends that these determinations are erroneous. The argument in support of these contentions requires a detailed analysis of the facts and evidence in this case.

Errors relied upon.

The United States Circuit Court of Appeals erred:

(1) In subjecting petitioner in this case to discipline by the Civil Aeronautics Board; and

(2) In finding that there is substantial evidence to support such Board's findings against petitioner.

ARGUMENT.

I.

Petitioner is not subject to discipline by the Civil Aeronautics Board.

The petitioner was acting under army orders and was flying an army plane. His plane was a B-25-C fast army bomber (R. 8, 10), identified as research plane NX 13,365 (R. 2, 22), employed in the development of an instrument landing system (R. 22), and flown in this instance with a United States Signal Corps observer to demonstrate such a system to an English delegate pilot (R. 12).

The petitioner's superior army officer, Colonel Yeager, stated that "these flights were of an experimental nature necessitating deviation from the standard procedure" (R. 21); and Lieutenant Perper of the Signal Corps, who was aboard the airplane as an observer, stated that many radio test flights with petitioner "demanded flying of an unusual nature" (R. 13).

The United States Circuit Court of Appeals, in the present case, not only admits, but find, that these flights of

petitioner "necessitated deviation from standard procedure" (R. 36). But after conceding the necessity of deviation in this flight, the Court says that there was no military necessity; that petitioner was under army orders to fly according to contact flight rules in accordance with Civil Air Regulations; and that: "Nowhere in the evidence submitted by petitioner is it stated or shown that any such act was demanded by Army instructions" (R. 38, 39). The Court then relies upon the fact that the Army Air Force Regulations apply the Civil regulations as far as possible; forgets the necessity for deviations which it has previously recognized; and overlooks petitioner's specific and uncontradicted statements as to following army practice and instructions. There is not a scintilla of evidence against the existence of army instructions and practices deviating from civil standards, and there was no effort to present any such evidence. And every deviation may require some deviating army practice, or a formal or informal deviating army instruction. Diving low and executing a climbing turn are the points at issue (R. 39). The Petitioner said that the army's flight instructions for a B-25 type airplane state: "Pull the nose up sharply to slow the plane down to below 160 P H before extending the wheels and flaps for landing" (R. 11). The petitioner also said: "In the absence of not being able to complete two-way radio communication with the Indianapolis tower, I proceeded, in accordance with standard army practice, of flying close to the control tower so as to attract the attention of the control tower operator and rocked the plane from side to side to let him know that I could hear him, but that he evidently did not hear me, after which I proceeded to a down-wind position from the field and proceeded to make a turn and land" (R. 10).

The Circuit Court of Appeals not only overlooks statements in the record regarding army regulations and prac-

tice, but also fails to recognize differences in types of air planes, and its own statement of the necessity for deviations.

The petitioner was flying as a lieutenant of the Army Air Force and not as a holder of a civil license (R. 23). There is not substantial evidence to support the findings of the Civil Aeronautics Board, but, if there were, the fact that the petitioner followed army regulations would not protect him from being penalized by that Board, if its present position is sustained. We would then have the disciplining of a pilot on the ground that the flight was not in accordance with civil aeronautical regulations, although the flight was in an army plane, under army control, pursuant to army directions, accompanied by army observers, and found to meet fully all army requirements and conditions. He was flying for the army, and under instructions from the army. He obeyed such instructions and was under duty to do so. Obedience of the instructions resulted in no injury and threatened none. The Civil Aeronautics Board penalizes him because it finds that in obeying army instructions he violated civil instructions.

No express authority is vested in the Civil Aeronautics Board to regulate or discipline army transactions of the character here involved. And it has long been established

> "that for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."
>
> *Freeland* v. *Williams*, 131 U. S. 405, 416 (1889).

In a summary of a complete annotation of cases involving the "Civil and criminal liability of soldiers, sailors and militiamen" it is said in 135 American Law Reports, Annotated (1941), at page 37:

> "Recognition of the peculiar necessity of discipline in the military service and of the position in which the

> subordinate may find himself through no fault of his own, in the event that commands of his superiors clash with the civil authority, has led courts in well-considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to civil or criminal liability, unless the order is so palpably unlawful that a reasonable man in the position of the person obeying it would perceive its unlawful quality."

Established principles of law relieve petitioner from civil or criminal liability for his obedience of army regulations. The power sought to be exercised by the Civil Aeronautics Board would permit a governmental agency to penalize him for such obedience. The Board would thus have more power than the civil courts have assumed. Through such power the Civil Aeronautics Board may block or control army aviation so far as it involves the use of licensed pilots. It may leave petitioner free to do army flying but may punish him as a civil pilot for observing army regulation in such flying.

The Circuit Court of Appeals says that the rule of *Freeland* v. *Williams*, 131 U. S. 405, 416, does not apply, "since there was no specific military order to violate a civil law or regulation here." Such a position would require a specific order to violate in order to protect every army activity which involves deviation from ordinary civil transactions.

If petitioner was flying for the army and in compliance with army instructions, there is no civil jurisdiction to punish him by withdrawing rights of a civil character. Petitioner alleges that he was flying in accordance with army instructions (R. 12). His army superior confirms this statement (R. 21). There is no contradictory evidence. It is true that the civil rule generally applies as to landing, but specific instructions were here relied on and not denied. There was a different type of airplane and no denial that

it required quicker and higher flight, which is the gist of the charge. Nor is there denial of inability to contact, and of orders under such circumstances to signal close to the control tower by rocking the plane.

The Civil Aeronautics Board here claims authority to penalize petitioner as a civilian flyer because of his obedience of deviating instructions as an army flyer. That it recognizes that it has no power to penalize him merely as an army flyer is shown by the fact that its order in no way interferes with his right to continue to pilot aircraft "while engaged in experimental work directly under the orders and control of the War Department" (R. 3). But the Civil Aeronautics Board would, under its asserted authority, have power to extend the restriction upon use of his civil certificate if he continued army flying under deviating army instructions.

In the position which it takes, the Circuit Court of Appeals relies upon *State* v. *Burton*, 41 R. I. 303, 103 Atl. 962 (1918). That case presented the question of liability of a driver in naval service for the violation of state speed laws, in obedience to instructions, which he was bound to obey, that he proceed with all possible dispatch. The opinion is completely in accord with petitioner's argument. In stating the applicable principle, the Court quoted from *In re Waite*, 81 Fed. 359:

> "The mere fact that when the acts by him done were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state, nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a clear subterfuge, and that under no fair consideration of his official duty, could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

The Court applied this principle by saying, at page 306:

> "The respondent is a sailor in the service of the United States and was bound to obey the lawful orders of his superior officer. The order in question, although it called for a disregard of the ordinary rules of conduct, was not illegal in the circumstances, but on its face was one which was justified by the rules of war and the situation then existing at Newport. It should protect respondent."

The rule applicable to a federal officer's subjection to local laws was well stated by Mr. Justice Holmes in *Johnson* v. *Maryland*, 254 U. S. 51, at page 56:

> "It very well may be that, when the United States has not spoken, the subjection to local laws would extend to general rules that might affect incidentally the mode of carrying out the employment,—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."

The issue here is not one as to state law, but the principle is the same as in *State* v. *Burton*. The petitioner was engaged in an army flight, in an army plane, and was under instructions which necessitated deviation from the standard procedure. The army instructions were dominant, and the United States Army had spoken. Its instructions were legal under the circumstances. They resulted in no injury and threatened none.

II.

The finding of the Civil Aeronautics Board is not supported by substantial evidence.

The evidence against petitioner is not substantial. The Circuit Court of Appeals finds substantial evidence to support the findings of the Civil Aeronautics Board in the "Alleged Violation Report" by Luther E. Dillon, Chief Airport Traffic Controller (R. 30) and "Inspector's Report

of Violation," by Henry M. Hamilton, Civil Aeronautics Authority Inspector (R. 27-29). These two reports are admittedly the only basis for the findings of the Civil Aeronautics Board (R. 37).

The Hamilton report states that "I personally observed these maneuvers" (R. 29). The Dillon report made no such statement but recited that "An alleged violation is indicated" and that "Further alleged violation is indicated" (R. 30). Petitioner claims that the Dillon report is not evidence. The Circuit Court of Appeals says that the report "is in the form customarily used by one who is an eye-witness" and "must be treated as having substantial weight" (R. 35). Petitioner further contends in this Court that the form of language is that customarily used by one who is not an eye-witness, and that this is indicated by the form of an accompanying report. The Dillon report is not that of a witness, and has no weight in this case.

Although Hamilton's report stated that he personally observed the flight (R. 29), petitioner claims that his statement as a witness in this case is also entitled to no weight.

Hamilton's report sets out in full two alleged violations by petitioner, one on January 13 and one on January 20, 1943, and indicates that he saw both violations (R. 29). The incident of January 13 was originally made the basis of the first paragraph of the complaint against petitioner (R. 2, 32). This paragraph of the complaint was withdrawn, evidently, because directly contradicted by Walter H. Gehlaar, co-pilot with petitioner at the time (R. 24), and, further, because an investigation by the Eastern Air Lines at the request of the Civil Aeronautics Administration did not reveal the incidents reported by Hamilton (R. 25-27).

The Circuit Court of Appeals holds, independently of the record, that Hamilton was trained to observe, and that his

report is substantial evidence as to the transactions of January 20 (R. 35-37). That Court says that his credibility is not to be considered by the Court, and that his reliability as a witness is not affected by his ability to report in detail a transaction which did not occur (R. 29); nor by his report that there were no occupants of the airplane with petitioner on January 20, when there were two skilled pilots as observers (R. 3, 8, 13, 28, 37).

With no evidence that Dillon was an observer, the sole basis of finding against the petitioner is Hamilton's report, the major part of which is obviously false. If his observation at one time was so clearly erroneous, this should be considered by the Court in weighing his other observations.

However, if the petitioner had presented no evidence, the record would not support the order restricting his pilot certificate. The charge in the first paragraph of the complaint having been withdrawn, the charges in paragraphs 2 and 3 are dependent upon each other, the charge in paragraph 3 involving what is alleged to have been done "in executing the above mentioned maneuvers" set out in paragraph 2 (R. 2). Even if Dillon were assumed to be an eye-witness, which he was not, and if weight were given to Hamilton's otherwise false report, this Court's attention is called to the fact that the two reports present no evidence in support of the charges of acrobatic flying and of flying lower than 500 feet—the charges in paragraphs 2 and 3 of the complaint. There is no evidence as to flying lower than 500 feet except as an incident to landing, nor as to acrobatic flying as defined by Civil Air Regulations. There is no proof of "*unnecessary flight evolutions voluntarily performed* with an aircraft requiring or resulting in an abrupt change in its attitude, or of a bank in excess of 70 degrees"; and without such proof acrobatics cannot be established (Civil Air Regulations, sec. 60.152). The Circuit Court of Appeals says that "There is sharp conflict

as to whether the plane descended below 500 feet" (R. 37), though there is no proof that it did, exclusive of landing; and the court justifies absence of specific proof of the charges in paragraphs 2 and 3 of the complaint by saying that "it clearly appears from the record that petitioner was fully apprised of the charges against him" (R. 38).

The evidence on behalf of petitioner is controlling. The Civil Aeronautics Board has not made a case against petitioner, even if its evidence were not controverted. At the time of the flight on January 20, 1943, the petitioner was piloting a B-25 C bomber in connection with war experiments under the supervision of Colonel Hobart R. Yeager of the Aid Corps (R. 21). In the flight he was accompanied by 1st Lieut. Lloyd J. Perper of the Signal Corps, who flew as an observer (R. 8, 13), and Squadron Leader R. J. Falk, Chief Test Pilot of the British Royal Aircraft Establishment (R. 3-4, 8).

Petitioner's defense is found in his explanatory letters of June 23, 1943, and March 24, 1943 (R. 9-13, 22-23); a letter from Squadron Leader R. J. Falk (R. 3-4); a letter of Colonel Hobart R. Yeager (R. 21), and a statement by Lieut. Lloyd J. Perper (R. 13).

These papers are to be applied only to paragraphs 2 and 3 of the complaint. Charges of needless and reckless risk to life and property are removed from the case by the abandonment of paragraph 1 of the complaint, and by the Board's finding that the evidence did not establish the charges in paragraph 4.

The second and third paragraphs of the complaint are parts of the same transaction. With respect to the second complaint the petitioner denies that he flew over the buildings of the airport (R. 11), and says that he flew close to the control tower "in accordance with standard army practice" in order to attract the attention of the control tower

operator. Perper states (R. 13) that he was acting as an observer and that petitioner "did not maneuver directly above airport buildings nor did he control his airplane in an unsafe manner." Falk wrote to the petitioner "that at no time did you perform any dangerous maneuver" (R. 3-4). Against this statement by the three men who were in the airplane we have only the "Inspector's Report of Violation" by Hamilton (R. 27-29), which has been completely discredited as to the portion of his statement regarding January 13, 1943. And attention should be called to the fact that Falk's statement directly contradicts the charge that petitioner piloted acrobatically, as that terms is defined in the Civil Air Regulations. With respect to the second paragraph of the complaint it is clear that no substantial evidence sustains the order restricting petitioner's pilot certificate.

Paragraph 3 of the complaint alleges descent to an altitude lower than 500 feet "in executing the above mentioned maneuvers." If the statement in paragraph 2 as to acrobatic piloting over buildings is not supported by substantial evidence, findings as to paragraph 3 are also unsupported. Paragraph 3 can only apply to "a dive followed by a steep climbing turn over buildings located on said airport," and the flying over buildings is specifically denied both by petitioner and by Perper. Petitioner's denial is accompanied by his statement that his flight was in accordance with Civil Air Regulations and with the army's flight instructions (R. 11). In any case the absence of substantial evidence is shown in that the only evidence against petitioner is the discredited "Inspector's Report of Violation" by Henry M. Hamilton, which also has no specific reference to the flying lower than 500 feet or any other number of feet (R. 29), other than as an incident to landing. No evidence as to the actual level of low flight appears in the record, and the Civil Aeronautics Board

apparently reached its findings on this matter by conclusions without evidence.

And with respect to acrobatics, a vital charge under both paragraphs 2 and 3 of the complaint, there is no evidence against petitioner, and specific evidence in his favor.

The Circuit Court of Appeals discounts the letters of Perper and Falk as being "framed in general terms" (R. 36), and implies that Perper's statement that "Captain Cameron did not maneuver directly above airport buildings" constitutes a statement that he did maneuver indirectly over such buildings (R. 37). Squadron Leader Falk's letter says that he kept a written account of the flight, and asks: "What on earth do they mean by acrobatic flying; a 30 degree bank?" (R. 4). The Court quotes this as a statement in general terms (R. 36), ignoring the fact that Falk was stating his observation; and the further fact that section 60.152 of the Civil Air Regulations provides that: "A normal bank not in excess of 70 degrees will not be considered as an abrupt change in the aircraft's attitude or as an abnormal attitude."

The function of the Court. The Circuit Court of Appeals takes the position that Dillon's report is that of an eyewitness, although the face of the report appears to indicate the contrary (R. 30, 35); and that obviously false statements by Hamilton as to his observation on January 13 in no way affected his statements in the same report regarding "his observation of what the plane did" on January 20, although the reported observations were similar in character and were obviously prepared with care as to the same party (R. 37). The lower Court says that this was a mere inaccuracy, and bears only on his credibility; and that this Court has determined that the weight and credibility of evidence are for the Board (R. 37). On this basis the lower Court says that "since we believe Hamil-

ton's and Dillon's statements constitute substantial evidence, it is clearly our duty to recognize the Board's finding as conclusive" (R. 37).

Paragraph (e), Section 1006 of the Civil Aeronautics Act of 1938 (U. S. Code, Title 49, Sec. 646, paragraph (e)), provides:

> "The findings of facts by the Board, if supported by substantial evidence, shall be conclusive."

But the Court must find the substantial evidence, and, in doing so, must determine what is evidence; what is its rational probative force, and its adequacy to support a conclusion. It is upon these grounds that the opinion of the Circuit Court of Appeals is here challenged. In these respects the lower Court erred (1) in treating as evidence a report having no such quality; (2) in refusing to consider the probative force of a report false in essential respects; (3) in refusing to consider whether such two reports constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; and (4) in refusing to consider evidence on behalf of petitioner in determining whether there was sufficient relevant evidence to support the conclusion of the Board.

In *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, the Court said, at page 229:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

And in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, p. 300, the Court repeated this statement. In the *Edison* case the Court also said at page 230 that there must be sufficient evidence of "rational probative force" and this statement was quoted with approval in *Federal Security Administrator* v. *Quaker Oats Company,* 318 U. S. 218, 229.

With respect to the Dillon report the lower Court had authority to determine whether Dillon was an eye-witness, and in this respect the issue is equally before this Court as to whether his report was in fact evidence.

With respect to the weight which might be given to the Hamilton report, on the basis of its substantial falsity in part, the lower Court takes the position that the weight and credibility of testimony are finally determined by the administrative body. In support of this view the Court quotes *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597:

> "The Board, like other expert agencies dealing with specialized fields * * *, has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony."

The *Link-Belt* case was cited with approval in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227-228.

The petitioner in this case does not complain of this rule, but objects to its misapplication by the lower Court. Under its view evidence completely lacking credibility must still be regarded as substantial evidence by the Court. Under the view taken by the Circuit Court of Appeals, Hamilton's report as to alleged transactions of January 13 would have constituted substantial evidence sufficient to support the charge in paragraph 1 of the complaint, had that charge not been withdrawn.

This position overlooks certain essential duties of the Court. In the *Link-Belt* case, the Court at page 597 cited with approval the statement in *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146, that:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The basis must be rational. The statute in the present case makes findings of fact conclusive "if supported by

substantial evidence," and "substantial evidence" must be found by the Court. There must be sufficient evidence of "rational probative force." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230, quoted in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 229. And there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229, quoted in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. If a court has before it an instrument shown by the record to be false or forged it may determine whether such an instrument constitutes adequate evidence to support a conclusion, irrespective of the finding of an administrative body.

The lower court appears to feel that it is bound, by decisions of this Court, to hold (1) that the weight and credibility of testimony are to be finally determined by the Civil Aeronautics Board, thus determining finally whether such testimony is evidence; and (2) that if any evidence of a substantial character is so disclosed, "it is clearly our duty to recognize the Board's findings as conclusive" (R. 37). This constitutes a position that any evidence against petitioner, if substantial, should it stand independently and uncontroverted, is to remain substantial evidence sufficient to support the finding of the Board, irrespective of evidence to the contrary. Evidence may be substantial if uncontroverted and standing alone, and may lose the character of substantiality because of controverting evidence. Otherwise, controverting evidence is futile. The decisions of this Court do not support the position of the Circuit Court of Appeals. This Court has properly said that an administrative determination "must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *Securities and Exchange Commission* v. *Chen-*

ery Corporation, 318 U. S. 80, 94; and see *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 476. But, in order to be sustained, the finding must be supported by "substantial evidence"; and the standards of such evidence, prescribed by this Court, do not permit a finding unsupported by the record.

Moreover, the rule as to finality in the weight and credibility of testimony is not as controlling here as in a case where witnesses were heard. The evidence in this case is in the form of reports and correspondence, and this Court is in the same position as was the Civil Aeronautics Board in determining the credibility of witnesses. In such a case the rule is not applicable that a court of review will generally accept the findings of a trial court which saw and heard the witnesses. In *United States* v. *Corporation,* 101 Fed. (2d) 156, 160, the Court said that:

> "Instead, this court is equally capable of examining the evidence and drawing conclusions from it, and is under the duty of doing so."

See also *Equitable Life Assur. Soc.* v. *Irelan,* 123 Fed. (2d) 462, 464; and *British American Assurance Co.* v. *Bowen,* 134 Fed. (2d) 256, 260. *Harkin* v. *Brundage,* 276 U. S. 36, 53, goes somewhat further:

> "Ordinarily we should acquiesce in a conclusion of fact by the court that heard the witnesses in such a case, but here the evidence of what was said in the State Court is on a stenographic report agreed upon by the parties, and the other circumstances make the necessary inferences therefrom clear."

The findings of an administrative agency may be of no more weight than those of a trial court, and the petitioner cannot be said to have surrendered a right to a broader review in this respect because he waived his right to hearing before the Civil Aeronautics Board.

Attention may also be given to the fact that the petitioner is penalized for an alleged offense "almost criminal" in

the words of counsel for the Civil Aeronautics Board in the Court below. The penalty may seem slight, but is a serious one for an airplane transport pilot, and should properly receive some of the attention of a criminal case.

In this case the burden has been placed upon petitioner to prove that he is not guilty. Proof of guilt is claimed to have been established by two official reports, one of which is not that of an eye-witness and the other false as to major allegations; and by a refusal to give weight to evidence on behalf of petitioner.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because that Court is in error in (1) holding petitioner subject to discipline by the Civil Aeronautics Board and (2) holding that the findings of the Civil Aeronautics Board are supported by substantial evidence.

Respectfully submitted,

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JUL 7 1944
CHARLES ELMORE CROPLEY
CLERK

(33)

No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1944

LELAND H. CAMERON, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 34–39) is reported in 140 F. (2d) 482. The orders of the Board may be found at R. 1–3.

JURISDICTION

The judgment of the circuit court of appeals (R. 40) was entered on February 4, 1944. A petition for rehearing was denied on March 14, 1944 (R. 40). The petition for a writ of certiorari was filed on June 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925, and under Section 1006 (f) of the Civil Aeronautics Act.

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board may temporarily suspend the civilian flying certificate of an Army pilot flying an Army plane who, without specific authorization or directions from his superior officers, violated the Board's Civil Air Regulations which are substantively identical with cognate provisions of the Army Air Forces Flying Regulations.

2. Whether the Board's finding that petitioner had violated the Civil Air Regulations was supported by substantial evidence.

3. Whether petitioner, who waived his right to a hearing before the Civil Aeronautics Board and did not seek a hearing or reconsideration of the Board's order after its entry, may raise, on judicial review of that order, questions not presented to the Board.

STATUTE AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the Appendices, pp. 19–27, *infra*.

STATEMENT

Petitioner seeks review of a judgment of the circuit court of appeals (R. 34–39) which affirmed an order of the Civil Aeronautics Board restrict-

ing for a period of 30 days the use of petitioner's air-line transport pilot certificate (R. 1–3).

On February 23, 1943, the Civil Aeronautics Administration filed a complaint with the Civil Aeronautics Board, charging that petitioner, the "holder of [an] airline transport pilot certificate", had on January 20, 1943, violated Sections 60.700 and 60.3503 of the Civil Air Regulations (Appendix B, pp. 23–24, *infra*) (1) by piloting "an Army B-25 aircraft * * * acrobatically over and/or within 1,000 feet horizontally of the Indianapolis, Indiana, Municipal Airport, in that he performed a dive followed by a steep climbing turn over buildings located on said airport" and (2) in executing the maneuver, by descending "to an altitude of lower than 500 feet above the ground" (R. 32–33).[1] This complaint was based upon reports charging such violations, filed with the Civil Aeronautics Administrator by a trained inspector and the Chief Airport Traffic Controller of the Indianapolis Airport, both of whom were representatives of the Civil Aeronautics Administration (R. 27–30). Petitioner was served with a copy of the complaint and at the same time was notified that he was "entitled to have a hearing concerning the charges contained" therein (R. 31).[2]

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[1] The complaint also alleged other violations (R. 32–33) which were subsequently withdrawn (R. 3).

[2] The Civil Aeronautics Act of 1938 forbids any person to serve in any capacity as an airman in connection "with any

A hearing was scheduled before a representative of the Board at Indianapolis on April 24, 1943 (R. 16). On March 30, 1943, the Board received a letter from Colonel Yeager, Air Corps Director of Wright Field, Dayton, Ohio, in which he stated that petitioner was engaged in experimental work

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civil aircraft used in air commerce" without an appropriate certificate "authorizing him to serve" in such capacity (sec. 610 (a) (2)) and empowers the Administrator "to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft" (sec. 602 (a)). The Board, "after investigation, and upon notice and hearing," may "alter, amend, modify, or suspend, in whole or in part, any type certificate" if "the interest of the public so requires" or "revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator * * * in refusing to issue to the holder of such certificate a like certificate" (sec. 609). Provision is also made (*ibid.*) for a limited temporary suspension of a certificate in cases of emergency "without regard to any requirement as to notice and hearing." See Appendix A, pp. 19–21, *infra*.

Under Reorganization Plans III and IV (5 U. S. C. §§ 133t–u), issued under the authority of the Reorganization Act of 1939, the function of administering safety regulations under the Civil Aeronautics Act has been divided between the Administrator of Civil Aeronautics and a five-member Civil Aeronautics Board. The Administrator is charged with the issuance of airman, aircraft, and air carrier certificates, the emergency suspension of certificates, the enforcement of safety rules and regulations, the investigation of violations of such rules and regulations, and the compromising of civil penalties for violations of the safety rules and regulations. The Board prescribes safety standards, rules, and regulations, and suspends and revokes certificates after hearing. See Final Report of the Attorney General's Committee on Administrative Procedure (1941), 175, 303–305.

necessitating "deviation from standard flying procedure" and that petitioner's alleged violations "were due to an unavoidable misunderstanding" (R. 21). The Board thereupon requested Colonel Yeager's presence at the hearing (R. 20). The hearing was convened on April 24 but was continued to May 14, 1943, at the request of petitioner's attorney because of the attorney's sudden illness (R. 16). Before this hearing could be held, petitioner, on May 13, 1943, personally waived his right to a hearing (R. 17). However, on May 14, 1943, petitioner's attorney requested that the waiver be set aside and the matter set down for hearing (R. 18–19). The Board promptly ordered a new hearing for June 4, 1943 (R. 14, 15), but petitioner again waived in writing his right to a hearing and requested that his case be presented to the Board in the usual manner followed when no formal hearing is held (R. 4–5, 9–10).[3] The Board then notified Colonel Yeager that the hearing had been cancelled (R. 14), and at petitioner's request delayed its consideration of this matter to permit petitioner to submit additional evidence (R. 4–5). Petitioner then filed with the Board a denial of the charges (R. 9–13)

[3] Section 97.16 of the Board's Rules of Practice Governing Suspension and Revocation Proceedings provides: "Where hearing has been waived by respondent, the Board shall make its decision on the basis of whatever data is submitted to it by the complainant and the respondent." 14 C. F. R. (Cum. Supp. 1943) 97.16.

and various letters in support of his denial (R. 3–4, 13, 24). On October 29, 1943, the Board found, after "due consideration of all the evidence of record", that petitioner had committed two violations of the Civil Air Regulations charged in the complaint filed by the Civil Aeronautics Administration and accordingly ordered, in the "public interest" (see sec. 609), that petitioner's air-line transport pilot license be "restricted for a period of 30 days", during which time petitioner "shall be permitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department" (R. 1, 3).

Petitioner then sought review of this order in the court below, contending (1) that he was immune from civil disciplinary action by the Board since the alleged violations of the Board's rules were committed while he was flying for the Army, under Army control and pursuant to Army requirements and instructions, and (2) that the findings of the Board were not supported by substantial evidence. The court below rejected these contentions, finding that the record before the Board supported the Administrator's charges; that although petitioner "was acting under Army orders and was flying an Army plane," his orders "on this flight" were "to fly according to contact flight rules in accordance with Civil Air Regulations"; that there "is no conflict between the

Civil Air Regulations and the Army orders or Army flight instructions"; and that "nowhere in the evidence submitted by petitioner is it stated or shown that any such act [charged as a violation] was demanded by Army instructions" (R. 38). The court subsequently denied a petition for a rehearing (R. 40).

ARGUMENT

Petitioner contends here, as he did below, that the Board's order of temporary suspension is invalid (1) because petitioner's alleged violations of the Civil Air Traffic Rules—the grounds for the suspension order—were authorized and required by Army orders relating to the flight upon which he was engaged (Pet. 10–15), and (2) because the finding of violation was not based upon substantial evidence (Pet. 15–25). We submit that the court below properly rejected these contentions and affirmed the Board's orders.

1. At the outset, there is serious doubt whether petitioner is entitled to raise these objections here or in the court below, since they were at no time placed before the Board. Section 1006 (e) of the Civil Aeronautics Act provides in part that—

> No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless

there were reasonable grounds for failure to do so.

The purpose of such a provision is of course to afford to the administrative agency "an opportunity to consider on the merits questions to be urged upon review of its order" (*Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 256), and thus "an opportunity to correct its errors, when attention is properly called thereto." *Mallory Coal Co.* v. *National Bituminous Coal Commission,* 99 F. (2d) 399, 407 (App. D. C.); see also *American Power and Light Co.* v. *Securities and Exchange Commission,* 141 F. (2d) 606 (C. C. A. 1); *Todd* v. *Securities and Exchange Commission,* 137 F. (2d) 475 (C. C. A. 6). Such an opportunity was never extended to the Board in this case.

Petitioner was served with a copy of the complaint which the Civil Aeronautics Administrator had filed with the Board and was informed that he was "entitled to have a hearing concerning the charges contained in the complaint, at which [he] may be represented by counsel, cross-examine witnesses called by the Administrator, and present evidence in [his] behalf" (R. 31). However, petitioner waived his right to a hearing and at no time requested access to the basis for the charges, *viz.,* the two reports of petitioner's offending conduct on his January 20, 1943, flight, which were at all times available and open to inspection by petitioner or his attorney. After the Board had en-

tered its order on October 29, 1943, suspending petitioner's license for 30 days commencing November 9, 1943,[4] petitioner did not move the Board for reconsideration of its order or for a hearing, as is frequently the practice where a hearing has been waived.[5]

Consequently, petitioner at no time presented to the Board his contentions, made in the court below for the first time and renewed in his petition here, that the Board's findings of violations of the Civil Air Traffic Regulations lacked substantial evidence (Pet. 15–25)[6] and that the Army flying regulations which bound petitioner during the flight in question required the violation of the Civil Air Traffic Regulations (Pet. 10–15).[7] To let

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[4] The 30-day period of restriction was to run ten days from the date of the order (R. 3) and was thus to begin on November 9, 1943 (R. 1).

[5] Section 285.8 of the Board's Rules of Practice provides in part: "Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board." 14 C. F. R. (Cum. Supp., 1943), Sec. 285.8. While these rules relate to "economic proceedings" (rate orders and the like), the Board always entertains a motion for reconsideration of its order, and if a hearing has been waived, would often grant a hearing on request. See, e. g., *Robert Rybolt*, Civil Aeronautics Board Docket No. S. R. 344; *Joseph M. Miklas*, Civil Aeronautics Board Docket No. S. R. 809.

[6] This contention is rested on the allegations that of the two investigators upon whose report the findings are based, one was not an eyewitness and the other had made unfounded statements (Pet. 15–25).

[7] On June 18, 1943, petitioner's attorney, by letter, raised before the Board the question as to whether petitioner's

petitioner attack the Board's order in the courts on grounds which, if submitted administratively and found to be meritorious, might have induced the Board either to supply the alleged deficiency in evidence or to modify its order, would make available a "tactic" with which "to ambush" an administrative agency. *Transamerican Freight Lines, Inc.* v. *United States,* 51 F. Supp. 405, 412, fn. 10 (D. Del.). Such a failure to utilize available administrative remedies stands as a barrier to the consideration of the new issues by an appellate court. *Mallory Coal Co.* v. *National Bituminous Coal Commission,* 99 F. (2d) 399, 407 (App. D. C.).

2. Petitioner assails the Board's order on the ground that he "was acting under army orders" and therefore "not subject to discipline by the Civil Aeronautics Board" (Pet. 10). There is, however, no question here of a conflict between military and civil regulations, for there is nothing in the record to indicate that petitioner was directed or required by military rules or orders to fly in such a manner as to violate the Air Traffic Rules of the Civil Aeronautics Board. On

"civilian license * * * or his conduct as a civilian airline pilot" could "be jeopardized or put in question when he is flying an Army B–25 bomber under the direction and control and pursuant to the orders of the Army" (R. 7). However, petitioner at no time contended before the Board, as he now contends in this Court, that the "army instructions and practices", as regards the flight in question, "necessitated deviation from the standard procedure" (Pet. 15) and from "civil standards" (Pet. 11).

the contrary, as the court below correctly held, "on this flight" petitioner's "Army orders were to fly according to contact flight rules in accordance with Civil Air Regulations," and there is "no conflict" between these regulations and the Army orders and flight instructions (R. 38).

Section 60.3503 of the Civil Air Traffic Rules, which petitioner was found to have violated, provides that "exclusive of taking off from or landing upon an airport or other landing area aircraft shall not be flown below the * * * minimum safe altitude of flight [of] 500 feet above the ground * * * or within 500 feet from any * * * obstruction to flight." See Appendix B, pp. 23–24, *infra*. These restrictions do not apply to "public aircraft previously authorized by the appropriate governmental agency, to make specific flights below such minimums in the public interest" (sec. 60.3503). There is not only absent any contention or indication here that such authorization was given, but the record shows the contrary, since petitioner had made the flight in question pursuant to directions from the Army authorities to proceed to his destination, the Indianapolis airport, "at CFR (Altitude)" (R. 8–9).[8] The abbreviation "CFR" denotes the "Contact Flight Rules" of the Civil

[8] This appears from the Departure and Arrival Report, a record of the clearance and arrival of the flight in question. The report is seemingly erroneously dated January 20, 1942 (R. 8–9). The actual date of the flight in question was January 20, 1943 (R. 2, 3–4, 5, 10, 13, 21, 29, 35).

Aeronautics Board and of the Army Air Forces,[9] and these regulations are substantially the same in regard to the minimum required altitude, for the Army Air Forces regulations in effect at that time (par. 16, Army Air Forces Reg. 60–16, September 9, 1942) likewise prohibit flights below 500 feet except during take-off and landing, or "within 500 feet of any obstruction to flight" (see Appendix B, pp. 26–27, *infra*).[10] The same situation exists in respect of Section 60.700 of the Civil Air Traffic Rules which petitioner was also found to have violated by performing acrobatics "within 1,000 feet" of the Indianapolis airport (R. 2). That regulation prohibits acrobatic flying within 1,000 feet of "any airport or landing area," and the corresponding Army Air Forces regulations (par. 10), as the Acting Air Judge Advocate points out (Appendix C, p. 28, *infra*), are even more "stringent in that they flatly prohibit acrobatics within 10 miles of an airport or airway" (see Appendix B, pp. 25–26, *infra*). In the

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[9] See Section 60.4 of the Air Traffic Rules of the Civil Aeronautics Board (14 C. F. R. 60.4), and Army Air Forces Regulation No. 60–16, September 9, 1942 (Appendix B, pp. 24, 26, *infra*.)

[10] The Army Air Forces Regulations permit "any maneuver" to be "conducted at such altitude * * * as is necessary for its proper execution * * * when such maneuver is required to accomplish an ordered tactical flight, engineering or training mission" (par. 16b; see Appendix B, pp. 26–27, *infra*). There is no contention or showing that petitioner was conducting a maneuver within the scope of this provision.

opinion of the Acting Air Judge Advocate of Headquarters, Army Air Forces, there is "no conflict whatever" between the Army Air Forces flying regulations and the Air Traffic Rules of the Civil Aeronautics Authority pertinent to this case (see Appendix C, p. 28, *infra*).

Nothing in the record supports petitioner's contention that the violations of the air-traffic rules occurred in obedience to military orders or instructions. The letter from Colonel Yeager, of Wright Field, stating that petitioner's "flights were of an experimental nature necessitating deviation from the standard procedure" (R. 21; Pet. 10), and the letter from Lieutenant Perper, stating that the flight "demanded flying of an unusual nature" (R. 13; Pet. 10), were properly characterized by the court below as "pure generalizations" since there was "nothing to show that Cameron [the petitioner] was authorized or ordered to depart from standard practice in this instance" (R. 38). Indeed, so far from requiring deviation from standard flying procedures, the Departure and Arrival Report of the flight, which petitioner signed, specifically states that the "pilot is familiar with local flight rules and regulations and those of the Civil Aeronautics Administration" (R. 9).[11] The Acting Air Judge Advocate of the

[11] Petitioner claimed below that he was unable "to complete two-way radio communication with the Indianapolis tower" and accordingly "proceeded, in accordance with standard army practice, of flying close to the control tower

Army Air Forces advises us that a dive or "buzzing within 50 feet of a control tower would find no excuse either in the fact that the flight was a test mission or in the fact that radio contact with the tower relative to a normal approach was delayed" (see Appendix C, p. 29, *infra*), but the civil infractions involved would not be excused even if they involved no violation of military law.[12] The lower court correctly ruled that petitioner's violations of the civil air rules were not required by military orders or regulations. The suspension order of the Civil Aeronautics Board places no restrictions upon the continued flying by petitioner for the military.[13] In the absence of any conflict between military orders and civil obligations, it is well established that a member of the military receives no immunity from his civil obligations or from the jurisdiction of civil authority over his offenses against civil laws. *Franklin* v. *United States,* 216 U. S. 559; *Caldwell* v. *Parker,* 252 U. S. 376; *Neall* v. *United*

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so as to attract the attention of the control tower operator" (R. 10; Pet. 11). However, this does not mean petitioner was required by Army order to fly in this manner.

[12] An acquittal before a court martial cannot be pleaded as a defense for the commission of the same act in a court of civil jurisdiction. *United States* v. *Cashiel,* 25 Fed. Cas. No. 14744, p. 318 (D. Md.); *In re Fair,* 100 Fed. 149, 151 (C. C. D. Neb.).

[13] The Board's suspension order specifically permits petitioner to continue flying "under the orders and control of the War Department" (R. 1). Cf. *Ex Parte Schlaffer,* 154 Fed. 921 (S. D. Fla.).

States, 118 Fed. 699 (C. C. A. 9); *United States* v. *Hirsch,* 254 Fed. 109 (E. D. N. Y.); *Stewart* v. *Commonwealth,* 185 Ky. 34, 213 S. W. 185; *State* v. *Sparks,* 27 Tex. 627, 632; *Winthrop's Military Law and Precedents,* 8d Ed. (Reprint, 1920) 877–878.[14]

3. While recognizing (Pet. 22) that the Board "like other expert agencies dealing with specialized fields * * * has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony" (*National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 597), petitioner contends that the court below erred in holding that there was substantial evidence to support the Board's finding (Pet. 15–25). The record clearly reveals a sub-

[14] That the acts found by the Board to constitute violations of its flying regulations were committed while petitioner was not exercising his rights as a holder of his air-line transport pilot's certificate does not affect the Board's power to suspend the certificate. Section 609 of the Act (Appendix A, p. 20, *infra*) empowers the Board, "after investigation, and upon notice and hearing" to suspend a pilot's certificate if "the interest of the public so requires" or "for any cause which, at the time of revocation, would justify the Administrator * * * in refusing to issue to the holder of such certificate a like certificate." The Board has refused to issue pilot certificates to reckless automobile drivers. See, *e. g.,* *Dunbar-Airman Certificate*, Civil Aeronautics Board Docket No. SR–32, January 16, 1940, 1 C. A. A. R. 525. The broad discretionary powers vested in the Board by Section 609 clearly authorize taking into account, in a disciplinary action, any acts of the accused having a reasonable bearing upon his ability to exercise competently his flying privileges without undue danger to others.

stantial basis for the administrative finding. The report of Luther E. Dillon, Chief Airport Traffic Controller of the Indianapolis Airport, states that petitioner's plane "entered the Indianapolis Contral Zone * * * and made a low approach from west to east barely missing the [control] tower" (R. 30). The report of Henry M. Hamilton, a civil aeronautics inspector who "personally observed" (R. 29) the maneuvers of petitioner, states that petitioner dived his aircraft "across airport, ninety degrees to incoming traffic, at a very low altitude, pulling aircraft up to a very steep climb, approximately 50 feet from control tower"; that no "prior approval" was requested by petitioner, "and no approval [was] granted by control tower operator"; and that such "conduct in flight" is "dangerous and very unnecessary" (R. 28–29).

Petitioner attacks the Dillon report on the ground that it is "not of a witness" (Pet. 16). While it is not designated as the report of an eyewitness, the court below properly observed that "it is in the form customarily used by one who is an eyewitness", whose duty as "a qualified chief airport traffic controller" is "to make accurate observations of maneuvering airplanes" (R. 35). Petitioner seeks to discredit Hamilton's credibility on the ground that the Administrator withdrew other charges against petitioner contained in the Hamilton report after determining, upon investigation, that there was not sufficient evi-

dence to support such charges (Pet. 16–17, 19–20). But such administrative action serves to reinforce the accuracy of the remaining charges, which the Administrator did not withdraw but after investigation found to be sustained. In any event, petitioner's attack upon these reports does not go to the propriety of their admissibility before the Board but is directed solely to their weight and credibility.[15] Since it is the function of the Board to appraise conflicting testimony and to appraise its weight and credibility, the court below properly refused to substitute its judgment for that of the Board. *National Labor Relations Board* v. *Link-Belt Company,* 311 U. S. 584; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Swayne and Hoyt* v. *United States,* 300 U. S. 297, 304.[16]

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[15] The evidence submitted by petitioner before the Board, *viz.*, letters from Lieutenant Perper and Squadron Leader Falk (R. 3–4, 13), does not contradict the specific charges of violation made by the Administrator but, as the court below observed, consisted merely of statements "framed in general terms indicating that Cameron [the petitioner] is a careful flier" (R. 36).

[16] Petitioner urges that the "rule as to finality in the weight and credibility of testimony is not as controlling here as in a case where witnesses were heard" (Pet. 24). This argument would mean that a person subject to discipline by an administrative tribunal would be in a better position by waiving a hearing than if a hearing were held. The effect of any such doctrine need not be elaborated. At any rate, this Court has applied the rule of administrative finality to determinations of administrative agencies such as the National Labor Relations Board (*e. g., National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584), a body that

CONCLUSION

The decision below is correct, and the case presents no question calling for further review. The suspension order of the Board does not burden or interfere with any military functions, whether of petitioner or anyone else. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Civil Aeronautics Board.

JULY 1944.

---

rarely hears witnesses or oral argument, its findings and decisions being based on reports of trial examiners who actually hear the case. See "National Labor Relations Board," the Attorney General's Committee on Administrative Procedure (1940), Monograph No. 18, pp. 34–72.

APPENDIX A

STATUTE

The Civil Aeronautics Act of June 23, 1938, c. 601, 52 Stat. 980 (49 U. S. C., secs. 401, *et seq.*), provides in part as follows:

SEC. 602.

(a) The Administrator of Civil Aeronautics is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

(b) Any person may file with the Administrator of Civil Aeronautics an application for an airman certificate. If the Administrator of Civil Aeronautics finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Board may determine to be necessary to assure safety in air commerce. Any person whose application for the issuance or renewal of an airman certificate is denied may file with the Administrator of Civil Aeronautics a petition for reconsideration, and the Administrator of Civil Aeronautics shall thereupon assign such application for hearing at a place convenient to the applicant's

place of residence or employment: *Provided,* That the Board may, in its discretion, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

(c) Each certificate shall be numbered and recorded by the Administrator of Civil Aeronautics; shall state the name and address of, and contain a description of, the person to whom the certificate is issued; and shall be entitled with the designation of the class covered thereby. Certificates issued to all pilots serving in scheduled air transportation shall be designated "airline transport pilot" of the proper class.

SEC. 609.

The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Board shall

immediately give notice of such suspension to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Board may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days.

SEC. 610.

(a) It shall be unlawful—

* * * * *

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft used in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of the terms of any such certificate.

SEC. 1006.

(a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

APPENDIX B

REGULATIONS

1. The pertinent Air Traffic Rules of the Civil Air Regulations of the Civil Aeronautics Board provide as follows:

(14 C. F. R., 1941 Supp.)

SEC. 60.350. *Minimum Safe Altitudes.*

Exclusive of taking off from or landing upon an airport or other landing area aircraft shall not be flown below the following minimum safe altitudes of flight:

SEC. 60.3500.

An altitude over the congested parts of cities, towns, or settlements, sufficient to permit at all times an emergency landing outside of such areas in the event of complete power failure, but in no case less than 1,000 feet above the ground.

SEC. 60.3502.

1,000 feet above the ground over any Federal penal institution or any open air assembly of persons.

SEC. 60.3503.

500 feet above the ground or water elsewhere than as specified in §§ 60.3500, 60.3501, and 60.3502, or within 500 feet from any mountain, hill, or other obstruction to flight, except as may be specifically approved by the Administrator: *Provided, however,* That seaplanes and amphibians

may be flown below 500 feet, but not below 300 feet, if making a contact flight during daylight hours over open water and where an emergency landing may, at all times, be made, without the aid of power, into the wind and without danger of collision with craft on the surface or other obstructions: *And provided further,* That the restrictions of this paragraph shall not apply to public aircraft, previously authorized by the appropriate governmental agency, to make specific flights below such minimums in the public interest.

* * * * *

(14 C. F. R.:)

SEC. 60.4. *Flight Rules (contact).*

In addition to general or special air traffic rules which apply, the following rules shall govern a contact flight in weather conditions equal to or better than those described in § 60.44, within the limits of a civil airway or control zone of intersection, or elsewhere in interstate or foreign air commerce.

SEC. 60.70. *Prohibited Zones.*

No person shall acrobatically fly an aircraft—

SEC. 60.700.

(a) At any height whatsoever over a congested area of any city, town, or settlement, or over any open air assembly of persons, or over any airport or landing area or within 1,000 feet horizontally thereof, or within any control zone unless the supervision of a Bureau inspector observing flight tests and then only between 2,000 and 5,000 feet above the ground or water.

2. The pertinent Army Air Forces Flying Regulations in effect on January 20, 1943, provide as follows:

A. A. F. REGULATION
No. 60–16

WAR DEPARTMENT,
HEADQUARTERS ARMY AIR FORCES,
Washington, September 9, 1942.

FLYING

Air Traffic Rules

(The following regulations will govern the operation of Army Air Forces aircraft in the continental United States.)

* * * * *

Section I. General Flight Rules

1. *Reckless Operation.*—An air force pilot will not operate aircraft in a reckless or careless manner, or so as to endanger friendly aircraft in the air, or friendly aircraft, persons or property on the ground.

* * * * *

3. *Air Traffic Control Procedures.*—Air force pilots will comply with air traffic control procedures established by competent authority.

* * * * *

10. *Acrobatic Flight.*—No pilot shall perform acrobatics:

a. At any height whatsoever over a congested area of any city, town, or settlement, or over any open-air assembly of persons, or within the area included within a radius of 10 miles of the

center of any airport, or within 10 miles of the center line of any civil airway.

b. At any place other than unrestricted areas.

c. Unless the maneuvers can be completed and the aircraft under complete control at or above 1,500 feet (altitude above the surrounding terrain).

d. At any place, unless the visibility is at least 3 miles and the ceiling at least 3,000 feet, and unless the pilot has first ascertained that there is no danger of collision with other aircraft.

* * * * *

Section II. Contact Flight Rules

* * * * *

16. *Minimum Altitudes of Flight.*

a. Except during take-off and landing, aircraft will not be operated:

(1) below the following altitudes:

(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight.

(b) At an altitude above the congested sections of cities, towns, or settlements to permit an emergency landing outside of such sections in the event of complete power failure.

(c) 1,000 feet above any open air assembly of persons.

(d) 500 feet above the ground elsewhere than as specified above.

(2) Within 500 feet of any obstruction to flight.

b. Any maneuver may be conducted at such altitude above the ground or water as is necessary for its proper execution in places other than specified above, when such maneuver is

required to accomplish an ordered tactical flight, engineering or training mission.

NOTE.—Section I.3 and I.10a of the above regulations were amended to read as follows by A. A. F. Regulation No. 60–16, Amendment of March 6, 1944, now in effect:

> 3. *Air Traffic Control Procedures.*—AAF pilots will comply with air traffic control procedures established by competent authority, and Standard Airport Traffic Control Procedures as approved by Army, Navy, and CAA, effective 1 January 1944.
>
> * * * * *
>
> 10. *Acrobatic Flight.*—No pilot will perform acrobatics:
>
> a. At any height whatsoever over a congested area of any city, town, or settlement, or over any open-air assembly of persons.
>
> b. Within the area included within the radius of five miles of the center of any airport, except when such airport is within an established local flying area; or within the limits of a civil airway except within that portion lying adjacent to, but outside of, a range approach channel.

Army Regulation No. 95–15, issued by General Marshall, Chief of Staff, on May 3, 1944, provides that "Civil Aeronautics Administration rules and regulations will be complied with when applicable" (Section 17, "Flight Regulations"). The other changes made by the recent amendment are not important here. See Appendix C, p. 29, *infra*.

APPENDIX C

LETTER

Letter from Acting Air Judge Advocate concerning parallel provisions of the Army Air Forces Flying Regulations and the Civil Air Regulations of the Civil Aeronautics Board:

HEADQUARTERS, ARMY AIR FORCES,
Washington, 14 June 1944.

SOLICITOR GENERAL,
Department of Justice, Washington, D. C.
(Attention: Mr. David L. Kreeger.)

DEAR SIR: The Department of Justice has requested the comment of this office with respect to certain parallel provisions of Army Air Forces regulations and Civil Aeronautics Authority rules. We are pleased to advise as follows:

In the opinion of this office there is no conflict whatever between Army Air Forces flying regulations and Civil Aeronautics Authority flight rules generally or between sec. 60.700–1, CAA Rules, and par. 10, AAF Reg. 60–16, 9 September 1942, particularly. The language and purport of these latter restrictions on acrobatics are practically identical except that the AAF provisions cited are the most stringent in that they flatly prohibit acrobatics under any conditions within 10 miles of an airport or airway.

So also par. 16, AAF Reg. 60–16, 9 September 1942, is the opposite number to sec. 60.350, CAA

Rules, and prohibits flights below 500 feet or within 500 feet of any obstruction to flight except when landing and taking off.

It is understood that your office has been furnished with a copy of the AAF regulation referred to. While this regulation has been superseded under date 6 March 1944, the new AAF Reg. 60–16 contains no changes important to the within remarks.

In order to stamp out dangerous flying practices the Army Air Forces have been obliged to adopt a policy of imposing severe punishment for wilful and serious violations of flying regulations. Intentional buzzing within 50 feet of a control tower would find no excuse either in the fact that the flight was a test mission or in the fact that radio contact with the tower relative to a normal approach was delayed. Such conduct frequently results in the general court martial of the flying officer concerned. Upon conviction, a sentence of substantial forfeiture of pay is imposed unless in an extreme case dismissal from the service is deemed appropriate.

Sincerely yours,

(Signed) EARL S. PATTERSON,
Earl S. Patterson,
Colonel, J. A. G. D.,
Acting Air Judge Advocate.

U. S. GOVERNMENT PRINTING OFFICE: 1944

AUG 2 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 142

LELAND H. CAMERON,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

Reply Brief.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 142

LELAND H. CAMERON,

Petitioner,

vs.

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Respondent.

Reply Brief.

The Petitioner is properly in this Court.

The primary purpose of the Civil Aeronautics Board is that of avoiding the issues presented by petitioner. Great weight is placed upon the fact that petitioner waived his right to a hearing (Respondent's Brief, 9); and that he did not move for reconsideration of the Board's order, which would have given the Board an opportunity to avoid some of the ineffectiveness of its record (Respondent's Brief, 10). Injustice is not justified by failure to make use of a motion for reconsideration, which would obviously have been futile. A remedy of review by the Circuit Court of Appeals is expressly provided by statute (U. S. Code, Title 49, sec. 646), and, in this case, the objection to penalizing the petitioner was urged before the Board upon the only grounds that could have met the charges before that

Board. Paragraph (e) of section 646 does not require that there be a motion for a rehearing or reconsideration before relief may be sought in the Court as authorized in paragraph (a) of the same section. Petitioner had submitted all evidence upon which the charges against him may be defeated, and was to gain nothing by a motion for reconsideration. The Board's position is that on a reconsideration it might have made a better case against the petitioner. The Board itself recognizes that there is no duty on its part to entertain a motion for reconsideration in this case and no right in petitioner to seek such reconsideration (Respondent's Brief, 9, note 5). The petitioner exhausted his administrative remedy, so far as he had such a remedy; and the Civil Aeronautics Board had, by its rules, given him no additional remedy. He had a right to seek judicial review.

The issues are properly before this Court.

The issues of this case relate to (1) army flying and (2) substantial evidence. It is now contended that such issues were not properly preserved. Such contention was not made in the Circuit Court of Appeals.

The order of the Board was that petitioner be suspended and all that appears in the record on behalf of petitioner may be regarded as an objection to the entry of such an order. And there can be no doubt of the duty of the Board to weigh the evidence that appears in the record of this case without motion on the part of petitioner that the Board act only on substantial evidence.

The complaint presented to the Civil Aeronautics Board by the Civil Aeronautics Administration charges improper piloting while flying army aircraft (R. 32), and the order restricting petitioner's license makes the same finding (R. 2-3). A substantial portion of the record, analysed on pages 10 to 12 of petitioner's original brief, relates to the

fact that he was engaged in army flying. Petitioner's statement of specific instructions with respect to the particular type of army airplane appears in the record (R. 11), as does his superior officer's statement that flights of this character required deviation from the standard procedure (R. 21).

But counsel for the Civil Aeronautics Board say that this issue was not presented to the Board (Respondent's Brief, 9), and that petitioner's attorney at no time made such a contention before the Board, although he by letter raised the issue before the Board (Respondent's Brief, 9-10, note 7). With oral hearing waived, it must be a military secret as to how the issue could have been raised otherwise than in writing, and as to why raising it in writing would not suffice, although the only available method. But Respondent further alleges that a claim that petitioner was flying "under the direction and control and pursuant to the orders of the Army" did not raise the issue of possible deviation of such army orders (Respondent's Brief, pp. 9-10, note 7), although this was the only possible reason for such claim; and although at the time the claim was made, the Board had before it evidence of deviation which petitioner had been authorized to make in Army flights (R. 13, 21), and which had been presented in defense of petitioner.

With respect to substantial evidence, the Courts have authority, and the question here is not one as to whether the inspector's and comptroller's reports (R. 27, 30) should have been considered by the Civil Aeronautics Board, but rather one as to whether they, as the sole evidence against petitioner, constitute substantial evidence of his guilt. Respondent contends that petitioner may not claim an absence of substantial evidence unless he specifically denied the substantial character of each piece of opposing evidence before the Board, although he could not know in advance

of the order whether substantial evidence would be found by the Board.

The issue of substantial evidence is one to be presented to the Court, and not to a Board which from alleged evidence before it has already determined guilt of what the Board's counsel below termed "almost criminal" conduct. And the issue here, while relating only to two official reports, also relates to the only evidence in this record which is relied upon as substantial evidence against petitioner and which must be relied upon to support the order. The issue is not merely one as to two reports, but as to whether they constitute substantial evidence sufficient to support the order.

The Civil Aeronautics Board had full opportunity to consider on their merits the questions of army flying, and of substantial evidence to sustain its order; and there is a statutory duty not to make findings unsupported by substantial evidence. The Board was fully apprised of the questions at issue, and no difficulty presents itself as in *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 256. And where a final order has been entered, and there is no right to seek or to obtain a reconsideration, it is not necessary to seek reconsideration by the Board in order to relitigate before it the Board's finding on what it has necessarily determined to have been based on substantial evidence.

The Petitioner was flying in accordance with army instructions.

Upon this matter, Respondent bases its argument on the claim that in petitioner's army flying no deviation was permitted from civil rules. The record shows that deviations had been required of him in army test flying (R. 13, 21) which had involved 1300 hours in the air (R. 12), and that the flight here involved was such a test flight (R. 23). And

nothing in the record contradicts or seeks to contradict petitioner's statement that he had and observed specific instructions regarding the type of army plane which he was flying in the test flight on January 20, 1943 (R. 10, 11, 12).

Respondent says that "there is nothing in the record to indicate that petitioner was directed or required by military rules or orders to fly in such a manner as to violate the Air Traffic Rules of the Civil Aeronautics Board" (Respondent's Brief, 10); and the court below said that "Army orders were to fly according to contact flight rules in accordance with Civil Air Regulations" (R. 38).

Respondent further misstates the question here at issue as one regarding the power of the Civil Aeronautics Board to suspend an army pilot flying an army plane who, "without specific authorization or directions from his superior officers," violates Civil Air Regulations "which are substantively identical" with army regulations (Respondent's Brief, 2). Here, as elsewhere, Respondent states issues upon an assumption that all facts are in its favor, and in disregard of the record in this case. In this instance Respondent assumes identity of regulations, and absence of any instructions for deviation.

While there is no admission that petitioner landed in the manner charged in the complaint, this record may show some deviation from the Air Traffic Rules, although there is substantial uniformity between the civil and army rules. Respondent contends that no deviations had been authorized, and that the directions to proceed "at C F R (Altitude)," denoting "Contact Flight Rules," gave instructions not to deviate (Respondent's Brief, 11-12), although use of a civil standard form might well be made as to an army plane without implying such instructions and may readily have been accompanied by instructions to deviate in flying the particular type of plane.

With respect to army flights by the petitioner, the record does not agree with statements of Respondent and of the lower court, and the question presents itself as to which is controlling. Petitioner's superior officer said that petitioner's flights necessitated "deviation from the standard procedure" (R. 21); and a Signal Corps observer who was with him stated that test flights by petitioner "demanded flying of an unusual nature" (R. 13). Unquestionably, deviation by petitioner had previously been authorized or ordered in a number of cases involving 1300 hours of test flying (R. 12). Petitioner stated specifically that he had deviating and supplementary instructions for the type of army plane which he was flying (R. 10, 11; Petition, 11), and this statement is uncontradicted.

There is nothing in the record contradicting petitioner's statement as to specific instructions in the present case, or his superior's statement as to necessary deviations in his other flights, unless such statements are contradicted by the admitted existence of uniform standards in the absence of deviation. Respondent takes the position that such uniformity establishes the "absence of any conflict between military orders and civil obligations" (Respondent's Brief, 14), directly contradicting statements of petitioner and of his superior as to necessary deviations; and Respondent supports this by introducing into this case a letter from the Acting Air Judge Advocate, dated June 14, 1944, based apparently upon a request so couched as to support Respondent's position (Respondent's Brief, 28-29).

The Opinion of the lower Court is not supported by Substantial Evidence.

The petition for certiorari calls attention to the fact that, to prove the charge against petitioner, certain specific acts must be proved, and that certain essential acts are not

proved, even if all alleged evidence be construed as proper (Petition, 8-9, 17-18). Respondent avoids any reply to this issue, which in itself is controlling in this case.

Respondent relies upon the Dillon and Hamilton reports as the sole basis for proof of the complaint against petitioner, and neither of these reports covers all matters necessary to establish such complaint; nor do the two considered together cover all such matters. This subject is sufficiently covered in the brief accompanying the Petition for Certiorari (Petition 8-9; 17-18).

But even if these reports had covered all matters necessary to be proved, there is absence of substantial evidence. Irrespective of the opinion of the Circuit Court of Appeals, the Dillon report neither directly nor impliedly indicates that he was an eye-witness. It rather indicates that it is a report based upon a statement to Dillon by some other person. Such a report is not evidence. This is sufficiently covered in the Petition, page 16.

The Hamilton report specifies that he personally observed two flights within one week of each other, one of which did not occur (R. 29; Petition, 16). Respondent claims that the accuracy of his one statement is reinforced by the falsity of the other, and the reinforcement claimed is that of the charge supported by Hamilton's statement (Respondent's Brief, 17).

The issue here is not one as to the weight of the evidence but is rather one as to the existence of substantial evidence. This is not a matter of expert evidence or expert judgment. This Court is equally as competent as the Civil Aeronautics Board to determine (1) whether essential matters in the complaint are supported by any evidence; (2) whether a written statement is to be impliedly construed as that of an eye-witness; and (3) whether part of a statement is to be treated as substantial evidence, when another part, charging a more serious offense just one

week previously, is found to be false, although the party making the statement bases his report on personal observation.

Conclusion.

This petition for certiorari should be granted and the order of the Civil Aeronautics Board set aside on the grounds that:

(1) Petitioner was piloting for the army under deviating instructions shown in the record; and is not restrained from continuance of such piloting, except by the threat of a further penalty if in such future piloting he continues to follow deviating army orders;

(2) There is no evidence as to essential elements in the complaint, proof of which was necessary to sustain the complaint;

(3) There is no substantial evidence as to any elements of the complaint.

Respectfully submitted,

DANIEL D. CARMELL
WALTER F. DODD
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1944

No. 142

LELAND H. CAMERON,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR REHEARING BY PETITIONER FOR CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 142

LELAND H. CAMERON,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR REHEARING BY PETITIONER FOR CERTIORARI.

Comes now the above petitioner, Leland H. Cameron, and presents his petition for a rehearing of his petition for certiorari, and, in support thereof, respectfully shows:

(1) There is no evidence in the record as to essential elements in the offense charged against petitioner, and of which he was found guilty. This is stated in petitioner's original brief (pages 8-9, 17-18) and is not contradicted by respondent. Without any evidence in support of essential elements of an offense charged by respondent, as defined in respondent's Civil Air Regulations, guilt of such an offense cannot be established.

(2) Not only is there no evidence in support of essential elements of the charge against petitioner, but there is no substantial evidence supporting any elements of such

charge. This is sufficiently shown in petitioner's original and reply briefs (Original Brief, 15-17; Reply Brief, 6-8).

(3) Respondent seeks, without evidence, to deny any deviations from Civil Air Regulations in Army flying. The only evidence in the record is the statement of petitioner's superior officer that deviations were necessary in petitioner's army flights (R. 21); and petitioner's undenied statement that he had flown 1300 hours under army instructions, and had such instructions in the flight here involved (Rec. 10, 11, 12).

(4) The penalty imposed upon petitioner may appear relatively slight, and of little concern to this Court, but it has the effect of establishing his guilt of what respondent's counsel below referred to as "almost criminal." Moreover, the sentence imposed upon him expressly permits his piloting of aircraft under the orders and control of the War Department during the 30-day suspension of his civil certificate (R. 3), and lays the basis for penalizing him still further for obeying any deviating instructions when flying for the War Department in future.

(5) The petitioner exhausted his administrative remedies. Respondent claims that petitioner should have moved for reconsideration of the Board's order, or for an oral hearing after the order was entered (Respondent's Brief, 9), but admits that the Board's Rules of Practice do not so provide (Respondent's Brief 9, note 5).

For the foregoing reasons it is respectfully submitted that this petition for a rehearing be granted and the order of the Civil Aeronautics Board be set aside.

Respectfully submitted,

DANIEL D. CARMELL,
WALTER F. DODD,
Attorneys for Petitioner.

Certificate of Counsel.

I, Walter F. Dodd, one of the counsel for Leland H. Cameron, the above named petitioner, do hereby certify that the foregoing petition for rehearing of this case is presented in good faith and not for delay.

WALTER F. DODD,
Of Counsel for Petitioner.